No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE, *et al.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc. and Gun Owners of California are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, as well as related issues.

Many of these organizations have filed *amicus curiae* briefs in other cases interpreting the scope and application of the misdemeanor crime of domestic violence ban of 18 U.S.C. § 921, including filing an

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae brief in United States v. Castleman, 572 U.S. __, 134 S.Ct. 1405 (2014).[2]

SUMMARY OF ARGUMENT

In the court of appeals below, dissenting Judge Juan Torruella — although a strong political supporter of the Lautenberg Amendment — nevertheless urged his panel colleagues to lay aside their personal views on "domestic violence" and "gun violence," and to do their duty as judges: to say what the law actually is, not what they might wish it to be. But Judge Torruella not only critiqued his fellow circuit court judges, but also this Court's Castleman reasoning, opposing any extension of the Lautenberg Amendment beyond what it already has done in United States v. Castleman. *See* United States v. Voisine, 778 F.3d 176, 217 (1st Cir. 2015) (J. Torruella, dissenting).

Not only did the panel majority below reject Judge Torruella's counsel, but it threw caution to the wind. Anchoring its analysis to one of the many social science reports that the Castleman Court claimed to have motivated Congress's adoption of the Lautenberg Amendment, the court below erroneously broadened an already overextended definition of a Misdemeanor Crime of Domestic Violence ("MCDV"). Indeed, had the panel below conducted a survey of the social science literature cited by the Castleman Court to have contained the "sobering facts" upon which Congress relied to enact the Lautenberg Amendment, it would

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[2] http://www.lawandfreedom.com/site/firearms/Castleman GOF Amicus Brief.pdf.

have discovered that, except for a snippet from a law review article dated 1987 and a modicum of information from a study dated 1996, all of the other social science data appeared in reports dated from 2000 to 2013, well after 1996 when the Lautenberg Amendment was passed.

To be sure, the Castleman Court did also rely upon a remark made by Senator Wellstone on the floor of the Senate in 1996, but on the whole it found that the legislative history, composed largely of senatorial statements supporting a narrower definition of a MCDV, "unpersuasive." Dismissing the statements of Senator Lautenberg and his fellow senators as "isolated references," the Castleman majority displaced the actual legislative history for a manufactured one through judicial usurpation of the legislative process.

As Justice Scalia pointed out in his concurring opinion, the Castleman majority based its decision primarily upon data gleaned from two *amicus curiae* briefs, and in so doing, assumed the role of a congressional committee or subcommittee, and then the Congress as a whole, fashioning a definition of "physical force" that conformed to the Court's policy choice, ignoring the MCDV text, and other related statutes. Not only that, but the Castleman Court adopted a definition readily amenable to the changing societal mores of family groupings and sexual behaviors, and thus, posing a significant threat to the constitutional right to keep and bear arms.

As dangerous as the Castleman rule is to the Second Amendment, any extension of that rule, such as the one made by the court of appeals below, should cause this Court to apply the constitutional-doubt canon of interpretation. This canon is of particular importance here because of the singular fact that there is apparently only one right in the federal Bill of Rights — the Second Amendment — that can be presumably lost to a person because of a misdemeanor, and one not involving a firearm or any real threat of physical violence. As a preexisting right, the right to keep and bear arms ought to enjoy the same stature as other inalienable rights, most notably, the freedoms of religion, speech, press, assembly, and petition. None of these First Amendment freedoms are lost as a result of being convicted of a crime. As it is true of the First, so it should be true of the Second. Both are equally privileges and immunities of United States citizenship that can only be lost by renunciation of citizenship status.

ARGUMENT

I. THE CASTLEMAN DEFINITION OF "PHYSICAL FORCE" IS ILLEGITIMATE, RESTING UPON A CORRUPT DECISIONAL PROCESS.

In a remarkable display of judicial candor, Judge Juan Torruella observed below that he "shared" the "grave concerns" of, and "strongly agree[d] with th[e] [laudable] purposes" of the "Lautenberg Amendment," as articulated by the First Circuit panel majority and by the Supreme Court in United States v. Castleman,

572 U.S. __, 134 S.Ct. 1405 (2014). But, he cautioned: "This case does not present a litmus test for judges, asking whether we oppose domestic violence and gun violence." United States v. Voisine, 778 F.3d 176, 216 (1st Cir. 2015) (Torruella, J., dissenting).

"Were our job so simple," Judge Torruella continued, "it would be an easy matter to decide in favor of the government." *Id.* But, he concluded:

> that is not our role. Our judicial obligations preclude us from such results-oriented decisionmaking.
>
> Rather than deciding on the basis of personal beliefs and policy preferences, or seeking to ensure that the Lautenberg Amendment encompass the broadest possible swath of conduct within its ambit, this case requires us to engage in statutory interpretation. This legal task implicates the difference between Congress's broad policy goals versus the precise statutory language employed to achieve those ends. [*Id.*]

No doubt the immediate targets of Judge Torruella's remarks were his two colleagues on the panel below. Indeed, Judge Sandra Lynch opened her majority opinion by sounding a very different judicial trumpet:

> Our answer is **informed** by congressional recognition in §922(g)(9) of the special risks posed by firearm possession by domestic abusers. "Domestic violence often escalates in

> severity over time ... and the presence of a firearm increases the likelihood that it will escalate to homicide...." *Castleman*, 134 S.Ct. at 1408. [*Id.* at 177 (emphasis added).]

It would surprise no one that Judge Lynch plucked this tidbit of social science from Castleman as her deliberative premise, following the lead of the Castleman majority before her:

> Recognizing that "[f]irearms and domestic strife are a potentially deadly combination," ... Congress forbade the possession of firearms by anyone convicted of "a misdemeanor crime of domestic violence." [*Id.* at 1408.]

Judge Lynch cherry-picked from Castleman this single social science "finding" calculated to give the circuit court panel an even wider scope of the Lautenberg Amendment's reach than the one already crafted by the Castleman Court. And she employed the same tactic used by the Castleman Court: to make it appear as if the social science data — gleaned from the "domestic violence" and "gun control" literature by the Castleman Court — had been before Congress in 1996 when it enacted the MCDV prohibition into law. However, the truth is, except for two items, the data relied upon in Castleman were not before the nation's lawmakers.

A. The Castleman Definition of "Physical Force" Rests Upon a Corrupted Premise.

In addition to the above assertion relied upon by Judge Lynch, the Castleman Court asserted that:

- "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year."

- "'When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed.'"

- "'[A]ll too often,' as one Senator noted during the debate over § 922(g)(9), 'the only difference between a battered woman and a dead woman is the presence of a gun.'"

- "[There were] 1,259,390 incidents of domestic violence in 2012."

- "[V]iolence among intimate partners caused deaths of 1,247 women and 440 men in 2000." [*Id.* at 1409.]

Immediately after setting out this list, and specifically referring to it, the Castleman majority stated, as a matter of fact, that "Congress **enacted [the MCDV ban] in light of these sobering facts**, to '"close [a] loophole'" in the gun control laws...." *Id.* at 1409 (emphasis added). Contrary to that assertion, however, such purported facts were most definitely not before Congress in 1996.

In 1996, the year in which Congress enacted the MCDV ban, Congress could not have known the number of deaths caused by violence four years later in 2000; nor could Congress have envisioned the number of incidents of domestic violence that would emerge 16 years later in 2012, as the Court asserted in footnote 1. *Id.* at 1409. As for the social science data that an abused woman was 6 times more likely to be killed "when a gun was in the house," and that there were "more than a million acts of domestic violence, and hundreds of deaths," such information appeared later in reports dated 2000 and 2003, published four and seven years, respectively, after Congress enacted the MCDV ban. *See id.* at 1409 and Georgia v. Randolph, 347 U.S. 103, 117-118 (2006).

As for the data relied upon by Judge Lynch, the statement that "[d]omestic violence often escalates in severity over time" is found in two *amicus curiae* briefs filed in Castleman. The data in one of those briefs were drawn from reports dated 2006, 2000, and 2003, as cited in that order.[3] The data in the other brief came from reports dated 2005 and 2000, supplemented by a single mention from a law review article published in 1987, and by information contained in a report dated 1996 — but without any supporting information or evidence that either had been considered by Congress in 1996.[4] The statement that

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[3] *See* Brief *Amici Curiae* of Major Cities Chiefs (Nov. 22, 2013) at 13-15.

[4] *See* Brief *Amici Curiae* of the National Network to End Domestic Violence (Nov. 22, 2013) at 9-12.

"the presence of a firearm increases the likelihood that it will escalate to homicide" appears to have been derived from reports dated 2003, 2013, 2002, and 2004.[5]

In short, with perhaps two exceptions, it would not have been possible for Congress to have known any of the "sobering facts" that, according to the Castleman majority, motivated that federal legislative body "to '"close [a] dangerous loophole"' in the gun control laws.'" To be sure, at the time of the passage of the MCDV ban, Senator Wellstone's rhetorical flourish must have been heard by his colleagues on the Senate floor. However, Senator Wellstone's hyperbole — that "the only difference between a battered woman and a dead woman is the presence of a gun"[6] — would hardly merit the appellation of a "fact," no matter how "sobering" an impact it may have had on the "debate," nor however suited it may have been to the judicial task at hand — unpacking the meaning of "use ... of physical force" in the definition of the MCDV ban.

B. The Castleman Definition of "Physical Force" Was Manufactured through a Judicial Usurpation of the Legislative Process.

At the close of the Castleman majority opinion, the majority justices shunned the senatorial "debate" in the shaping of its interpretation of the meaning of "the

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[5] *See id.* at 14-15.

[6] Castleman at 1409.

use ... of physical force." In response to Castleman's appeal to "legislative history[,] suggest[ing] that Congress could not have intended for the provision to apply to acts involving minimal force," the Castleman majority found the several remarks of senators who supported the MCDV ban "unpersuasive." Castleman at 1415. Despite the fact that the Castleman Court acknowledged that "several Senators argued that the provision would help to prevent gun violence by perpetrators of severe domestic abuse," the Court concluded that "these Senators' **isolated references** to severe domestic violence [do not prove that they] would not have wanted § 922(g)(9) to apply to a misdemeanor assault conviction like Castleman's." *Id.* (emphasis added). Among the Senators whose remarks the Court characterized as an "isolated reference[]" was that of Senator Wellstone, who was reported to have said that the MCDV ban "would help to prevent gun violence ... by ... people who '**brutalize**' their wives or children." *Id.* (emphasis added).

Yet, as noted above, the Castleman majority previously cited another of Senator Wellstone's remarks — that "'the only difference between a battered woman and a dead woman is the **presence** of a gun'" — as one of those "sobering facts" that prompted Congress to "'"close [a] dangerous loophole'" in the gun control laws." *Id.* at 1409 (emphasis added).[7]

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[7] Could the difference between the two Wellstone remarks be that the latter supported a smaller opening for lawful possession of firearms, whereas the former would have allowed more people to retain their right to keep and bear arms?

One would think that if the Castleman Court were really interested in the "extent that legislative history can aid in the interpretation of [a] statute," as it said it was, then the majority would have searched the Congressional record for all relevant statements, including those revealing the Senate's more narrow focus on violence — such as Senator Lautenberg's reference to "serious spousal or child abuse" or "violent individuals." *See id.* After all, Senator Lautenberg, after whom the MCDV ban was named and its most prominent sponsor, had a great deal more to say about the ban than these hand picked by the Castleman majority, and as recited by the court of appeals below. Voisine at 183.

However, focused on the social science studies of "domestic violence" and "gun violence," the Castleman majority appeared to be uninterested in finding out what really transpired on the Senate floor or, for that matter, anywhere else in the nation's legislative halls. As Justice Scalia correctly pointed out in concurrence, the majority showed no interest in conducting a careful textual or contextual analysis of the MCDV ban language.

Instead, as Justice Scalia maintained, the majority "base[d] its definition on an *amicus* brief ... and two publications issued by the Department of Justice's Office on Violence Against Women." *Id.* at 1420-21 (Scalia, J., concurring). In purpose and by effect, the Castleman majority acted as if it was part of Congress, treating the *amici* as if they were appearing before a legislative committee in support of legislation to be enacted into law. As Justice Scalia observed, these

amici provided "such a wide range of nonviolent and even *nonphysical* conduct that they cannot possibly be relevant to the meaning of a statute requiring 'physical force,' or to the legal meaning of 'domestic violence' (as opposed to the meaning desired by private and governmental advocacy groups)." *Id.* at 1421.

Although the Castleman majority purported to find that "Congress incorporated the common-law meaning of 'force' — namely, offensive touching — in § 921(a)(33)(A)'s definition of a [MCDV]," Justice Scalia rightfully established that the majority's "expansive common-law definition cannot be squared with relevant precedent or statutory text." *Id.* at 1418-19.

C. Castleman Did Not Produce a Fixed Rule of Law of Physical Force, But Rather an Evolving Behavioral Standard That Will Change with Changing Times.

As dissenting Circuit Judge Torruella points out, under Maine law, an "offensive" touching may be "effected by indirect touchings (*e.g.*, the touching of items intimately connected to the body, such as clothing or a cane ...)" so long as a "reasonable person would find the physical contact to be offensive, under the particular circumstances involved." Voisine at 206. Although such a standard might make sense as a matter of tort law, it is highly questionable whether such an amorphous standard suffices as a matter of criminal law. *Id.* at 206-08. To that end, Judge Torruella notes that the Model Penal Code "limit[s] battery to instances of physical injury and cover[s]

unwanted sexual advances by other statutes." *Id.* at 207-08. And for good reason. Community standards respecting what may be tortiously or criminally "offensive," while subject to the traditional standard of reasonableness, necessarily fluctuate with changing times. This is particularly true in contemporary America in the area of family life and sexual relationships. What is permissible yesterday has become impermissible today, and vice-versa. Who knows what the standard of "offensiveness" will be tomorrow?

Additionally, the change of sexual mores in society has been accompanied by proliferation of advocacy groups. And with those groups have come, as Justice Scalia pointed out in his Castleman concurrence, "capacious" and "unconventional" definitions of "domestic violence" that are so extensive that almost anything that subjectively offends would qualify, even to the extent that "everything is domestic violence," thereby necessitating the coining of a new word "to denote actual domestic *violence*." *See id.* at 1421.

Coupling these widespread changes in societal relationships with a judicial penchant for change,[8] newly discovered rights proliferate, while pre-existing rights suffer from evolving standards at the hands of a judiciary that has long abandoned the notion that law, if it is to be law, must be fixed regardless of time, not malleable in the hands of jurists willing to indulge their own personal and policy agendas. *See* A. Scalia

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[8] *See, e.g.*, Obergefell v. Hodges, 576 U.S. __, 135 S.Ct. 2584 (2015).

& B. Garner, Reading Law at 403-410 (West: 2012). As Judge Torruella observed in the court of appeals below, it is time for this Court to return to its judicial task of "statutory interpretation" (Voisine at 216), and in this case, to an interpretation of a statute that bears heavily against petitioners' constitutional right to keep and bear arms.

II. A BROADENED CASTLEMAN RULE WOULD ILLEGITIMATELY DEPRIVE PETITIONERS OF THEIR INALIENABLE RIGHT TO KEEP AND BEAR ARMS.

This Court rejected Castleman's plea "to read § 922(g)(9) narrowly because it implicates his constitutional right to keep and bear arms." *Id.* at 1416. The Court declined Castleman's invitation, because he "has not challenged the constitutionality of § 922(g)(9), either on its face or as applied to him." *Id.* Such is not the case here, since petitioners challenged the Maine statute under which he was convicted on the ground that, as applied to them, the statute deprived them of their Second Amendment rights. *See* Voisine, 778 F.3d at 186. Although the grant of certiorari does not include review of this claim, petitioners' claim that this Court should read § 922(g)(9) narrowly because the broader reading urged by the Government "implicates [their] constitutional right to keep and bear arms" requires, unlike Castleman, more than a "cursory nod to constitutional avoidance concerns." Castleman at 1416. Thus, those concerns must be addressed. *See* Reading Law at 247-51.

As Justice Scalia's concurrence warned, it is one thing for a government agency to employ a "capacious" definition of "domestic violence," in a "'health care setting.'" *Id.* at 1421 and n.9. It is quite another to adopt such a broad reading in a criminal prosecution. *Id.* This concern is especially important in relation to the right to keep and bear arms, in that it is the only individual right in the federal bill of rights that may be presumably forfeited by criminal or other behavior defined by the Government. In District of Columbia v. Heller, 554 U.S. 570 (2008), this Court opined that the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" were "presumptively lawful." *Id.*, 554 U.S. at 626-627 n.26. Would the same be presumptively true of the First Amendment freedoms of religion, speech, press, assembly, and petition? Of course not. Although such First Amendment freedoms may be severely limited while one is incarcerated, they are not totally lost. In contrast, for example, unless an MCDV conviction is expunged or set aside, or unless the person has been pardoned or otherwise restored to his civil rights, the Second Amendment **right** to keep and bear arms is lost forever. *See* 18 U.S.C. § 921(a)(20) and (33).

A. As Citizens, Petitioners Possess the Second Amendment Right.

Heller put to an end the absurd idea that the Second Amendment secures only a "collective," not an individual, right. Heller, 554 U.S. at 595. Indeed, even the dissenting justices agreed that the Amendment protects the individual right "to use weapons for certain military purposes." *Id.* at 636.

Heller also made clear that the Second Amendment individual right inures to the "People," that is, those persons who are part of the national political community — American citizens — not to any person who may happen to be on American soil, such as those on a tourist or student visa. *Id.* at 579-81. Thus, the right "is [to be] exercised individually and belongs to **all Americans.**" *Id.* at 581 (emphasis added).

Any other reading as to whose rights were protected would have brought the operative clause into conflict with the Second Amendment's prefatory clause. As Heller confirmed, the prefatory clause — "A well-regulated Militia, being necessary to the security of a free state" — "announces [the] purpose" of the second, or operative, clause: "the right of the people to keep and bear arms, shall not be infringed." *Id.* at 576-77. As a statement of purpose, the prefatory clause is there to "clarify" — "to resolve an ambiguity in the operative clause": "Logic demands that there be a link between the stated purpose and the command." *Id.* at 577.

According to Heller, the purpose stated in the prefatory clause is "to secure the ideal of a **citizen** militia." *Id.* at 599 (emphasis added). The operative clause was settled on as the best way to accomplish this purpose because "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the **people's** arms, enabling a select militia or standing army to suppress **political opponents.**" *Id.* at 598 (emphasis added).

Logic demands, then, that the Second Amendment be understood as securing the individual right of **citizens** — "'the people composing [the American] nation or community'" — to keep and bear arms. *See id.* at 597.[9] An alien is not comprehended by the nation's charter as part of the "the people" entitled to "dissolve the political bands which have connected them with another," or "to alter or to abolish [the current form of Government] and to institute a new Government." Declaration of Independence. And no such person is comprehended by "We the People" of the Constitution's Preamble, nor endowed with "the powers [of] the people" secured by the Tenth Amendment of that document.

B. A Right of Citizenship Cannot Be Involuntarily Divested.

Even though misdemeanants, as American citizens petitioners remain part of the national polity. Unless the government can affirmatively demonstrate that, because of their misdemeanor convictions, petitioners may be deprived of a right that would otherwise belong to them as citizens of this country, petitioners remain among the "people" protected by the Second Amendment. The court of appeals below ruled otherwise, concluding:

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[9] Although an alien traveling as a tourist, studying at an American university, or possessing a temporary work visa, or even an illegal alien, may exercise the same common law or statutory right of self-defense or firearms ownership as any American, no such alien could legally claim protection of the Second Amendment, for he is not part of "the people."

> Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence from firearm possession in other contexts. [Voisine at 187.]

Such rationalization is reminiscent of the reasoning that animated the English Bill of Rights of 1689, which limited the right to keep and bear arms to Protestants, and thus, permitted the "disarm[ing of] Roman Catholics — 'for the better secureing their Majestyes Persons and Government." *See* K. Marshall, 32 HARV. J. OF L. & PUB. POL. 695, 721-22 (2009). Indeed, the government's purported concern for community safety is not dissimilar to the concerns underpinning the Black Codes, which deprived United States freedmen of their right to keep and bear arms. *See* R. Cottrol and R. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," 80 GEO. L. J. 309, 344-46 (Dec. 1991).[10]

The privileges and immunities of United States citizenship, however, are not subject to involuntary divestiture by the United States Government. In Afroyim v. Rusk, 387 U.S. 253, 257 (1967), the Supreme Court ruled that United States citizenship,

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[10] Some observers have even claimed that modern gun control was motivated in part by fear of black radicals and urban violence. *See* R. Sherill, The Saturday Night Special 280 (Penguin Books: 1973) ("The Gun Control Act of 1968 was passed not to control guns but to control blacks....")

once vested, may not be "take[n] away ... without [the citizen's] assent":

> [W]e reject the idea ... that ... Congress has any general power ... to take away an American's citizenship.... This power cannot ... be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country **the people are sovereign and Government cannot sever its relationship to the people by taking away their citizenship**. [*Id.* (emphasis added).]

If Congress has no power to strip away **all** of the privileges of a citizen then, quoting Chief Justice Marshall in Osborn v. Bank of the United States,[11] "[t]he constitution does not authorize Congress to ... **abridge** those rights." Afroyim, 387 U.S. at 261 (emphasis added). Furthermore, the Afroyim Court wrote:

> [W]hether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship.... There is no indication in these

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[11] 22 U.S. (9 Wheat.) 738, 927 n.22 (1824).

> words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. **Once acquired, this Fourteenth Amendment citizenship** was **not** to be shifted, canceled or **diluted** at the will of the Federal Government, the States, or any other governmental unit. [Afroyim, 387 U.S. at 262 (emphasis added).]

Thus, the Court concluded that Congress had adopted the citizenship clause in the Fourteenth Amendment "'to put this question of citizenship and **the rights of citizens ... beyond the legislative power.**" *Id.*, 387 U.S. at 262-63 (emphasis added).

The court of appeals below would have this Court disregard these principles, extending the MCDV disqualification as a salutary measure to "better ensure that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault." Voisine at 183. But by that logic, what principle would prevent the government from abridging, for example, First Amendment rights as well? Could the government deprive a citizen of his freedom to engage in a peaceable assembly on the ground that he previously had been convicted of disorderly conduct in relation to a public protest against an abortion clinic which, in Congress's predictive judgment, created serious dangers to the public peace and a woman's right to choose? According to the principles enunciated in Afroyim, the privileges

and immunities of United States citizenship can only be lost by a voluntary renunciation of citizenship, not by the commission of any act that Congress might consider sufficient to justify the deprivation of his privileges and immunities in the future.

C. Petitioners Have Not Forfeited Their Second Amendment Rights.

Even the Afroyim dissenters did not believe that Congress had plenary power to strip a citizen of his citizenship privileges. Rather, they concluded that Congress could take away a person's citizenship if that person engaged in an act that "indicate[d] a dilution of his allegiance to this country." *See* Afroyim, 387 U.S. at 268-69. According to the dissenting justices, such an act could be the basis upon which Congress could conclude that the person had "forfeited" his citizenship rights. *See id.*, 387 U.S. at 286.

Although such views have been determined to justify the deprivation of a citizen's right to vote based upon a conviction of certain felonies, as the Supreme Court ruled in Richardson v. Ramirez, 418 U.S. 24 (1974), such historical deprivations have been based upon criminal acts far removed from Voisine's having been convicted of a MCDV. A MCDV conviction does not implicate petitioners' patriotic allegiances, in contrast to an act of insurrection or treason or commission of a similar crime, such as was the case in Richardson. Moreover, in contrast to the right to keep

and bear arms, the right of a citizen to vote is not, *per se*, constitutionally secured.[12]

Nor is a MCDV conviction, as defined by the court below, historically linked to the commission of a felony at common law, justifying the forfeiture of one's standing as a citizen. According to Blackstone's Commentaries, a conviction of a common law felony "occasion[ed] a total forfeiture of either lands, or goods, or both." IV W Blackstone, Commentaries on the Laws of England, 95 (U. Of Chi. Facsimile ed., 1769). Under the feudal system, such a total forfeiture severed the felon not only from his land, but also the felon's connection to his Lord, and resulted in expatriation. *Id.* at 95-97. By contrast, a misdemeanor conviction did not produce any such "civil death." *See* K. Marshall, 32 HARV. J. OF L. & PUB. POL. at 714-15. Rather, a misdemeanor (in contrast to a felony), was concerned with only "smaller faults, and omissions of less consequence." Blackstone at 5.

Such distinctions among felonies, crimes, and misdemeanors prevailed in early America. Indeed,

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[12] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966). Rather, it is secured only against certain discriminatory criteria, such as race, sex, payment of a poll tax, and the age of 18. *See* Amendments 15, 19, 24, and 26, U.S. Constitution. Thus, Section 2 of the Fourteenth Amendment allows for the excepting of persons denied the elective franchise on account of "**rebellion or other crime,**" and various Acts readmitting the states of the confederacy allowed for disenfranchising persons for "**rebellion or for felony at common law.**" Richardson, 418 U.S. at 41-55 (emphasis added).

Noah Webster's 1828 Dictionary definition of "felony" — as "any crime which incurs the forfeiture of lands or goods" — is a verbatim quote from Blackstone. The definition of "misdemeanor" is likewise the same as Blackstone's. Thus, there is no historical justification for treating MCDV and felony convictions as functional equivalents with respect to the forfeiture of the right of a citizen to keep and bear arms. *See* H. Titus, "Second Amendment: Rule by Law or Judges?" 8 LIBERTY U. L. REV. 577, 600-04 (2014).

Indeed, there appears to be a serious question whether the commission of a felony — aside from treason and like offenses — could trigger forfeiture of any constitutionally secured citizenship right in the United States, a country where the feudal system never gained a foothold, but where sovereignty has always resided in an educated and God-fearing people. *See* K. Marshall, 32 HARV. J. OF LAW & PUB. POL. at 715-16. *See also* J. Adams, "A Dissertation on Canon and Feudal Law," reprinted in The Revolutionary Writings of John Adams, pp. 21-35 (Liberty Fund, Indianapolis: 2000) ("Rulers are no more than attorneys, agents, and trustees, for the people; and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed, and to constitute abler and better agents, attorneys, and trustees." (p. 28)).

Even assuming that petitioners could forfeit their right as American citizens to keep and bear arms on some grounds other than voluntary renunciation of citizenship, the court of appeals below has utterly

failed to recite any constitutionally legitimate ground upon which to deprive petitioners of such right.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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